In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1376

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is reported at 529 F.2d 66. The Board's decision and order (Pet. App. 13a-24a) is reported at 215 NLRB No. 30. The decision and direction of election by the Regional Director in the related representation case is set forth at Pet. App. 25a-32a.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1976. The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the union's unconditional offer to all unit employees to waive initiation fees and dues until after a collective bargaining agreement was negotiated and ratified did not warrant setting aside the representation election.

2. Whether the Board abused its discretion in determining that employees in the company's district office constituted a separate bargaining unit.

STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 1a-3a.

STATEMENT

1. In 1973, the Insurance Workers International Union, AFL-CIO (the Union) filed a representation petition with the Board, seeking certification as bargaining representative for office clerical employees at the Grosse Pointe, Michigan, district office of The Prudential Insurance Company of America (the Company). The Company opposed the petition, contending that the district office was an inappropriate bargaining unit and that the bargaining unit should include all employees in its North Central Region, encompassing 48 district offices in seven states (Pet. App. 26a). After an evidentiary hearing, the Board's Regional Director found that the Company's

basic unit of operations was its district office,[1] and that the Grosse Pointe district office was relatively autonomous.[2] Accordingly, the Regional Director concluded that the bargaining unit sought by the Union was appropriate. The Board denied the Company's request for review of the Director's decision (A. 1).

---

[1]In particular, the Regional Director found that the Company administers its nationwide insurance operations through nine regional home offices. Its North Central Region comprises 48 district offices in Michigan, North and South Dakota, Nebraska, Iowa, Minnesota, and Wisconsin; the North Central Regional Home Office is located in Minneapolis. (Pet. App. 26a; A. 67-69, 254. "A." references are to the printed appendix to the briefs in the court of appeals, a copy of which we have lodged with the Clerk of this Court.) The district offices sell and service insurance policies within distinct geographic areas (Pet. App. 27a; A. 146, 151-152). Each district office has responsibility for the "training, disciplining [and] hiring * * *" of its clerical employees (Pet. App. 27a; A. 110). The district office determines whether the employees should work overtime, it schedules their lunch hours and vacations, and it adjusts their individual working hours (Pet. App. 27a-28a; A. 74-75, 95, 104-105, 133-134, 186, 204, 226-227). In addition, the district office is responsible for evaluating the employees' performances; it reprimands and disciplines them and recommends discharges when necessary (Pet. App. 27a-28a; A. 78, 110-111, 198-199, 218-219). Grievances and complaints are ordinarily settled at the district level (Pet. App. 28a; A. 93-94, 148, 223-224). While wages, fringe benefits, vacations, and work standards are based upon guidelines which are formulated by the corporate home office and adjusted by the regional home offices, the district office can recommend that employees be placed on a higher pay scale (Pet. App. 28a-29a; A. 76-77, 88-90, 131, 149), and it initially decides upon promotions and wage increases (Pet. App. 28a, n. 4; A. 86-88, 96, 104-105, 163, 183).

[2]In particular, the record shows that the Grosse Pointe office is located 10 miles from any other district office (A. 229). Moreover, there is no significant interchange of employees between Grosse Pointe and other district offices; out of 300 clerical employees in North Central Region's district offices, only about 20 transfer annually and few transfer temporarily (Pet. App. 29a; A. 107, 156-157, 255-257). The Grosse Pointe office's geographical boundaries have remained stable. In 1972, for the first time in 5 years, a boundary adjustment resulted in the gain of one clerical employee (Pet. App. 29a, n. 5; A. 120, 159-161).

POOR COPY

2. The Union unanimously won the ensuing representation election and was certified. The Company thereafter refused to bargain with the Union (Pet. App. 13a-14a). In the subsequent unfair labor practice proceeding, the Company contended that the bargaining unit was inappropriate, and that "newly discovered evidence" showed that the Union interfered with the conduct of the election by offering to waive its dues and fees until a collective bargaining agreement was negotiated and ratified (Pet. App. 15a, 17a). The Board rejected these contentions, noting that the Union's offer to all employees to waive dues and fees did not contravene *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270 (Pet. App. 16a-17a).[3] Finding that the Company's refusal to bargain therefore violated Section 8(a)(5) and (1) of the Act, the Board entered a bargaining order (Pet. App. 21a-22a).

3. The Company sought review in the court of appeals, contending that the Board's order should be set aside because the bargaining unit was inappropriate and because the Union's offer to waive dues and fees impermissibly interfered with the election. The court of appeals enforced the Board's order, concluding, *inter alia*, that "the Board's view that the district office has the degree of autonomy necessary for being an appropriate bargaining unit is supported by this record taken as a whole" (Pet. App. 8a) and that the Union's offer to all employees to waive dues and initiation fees until a collective bargaining agreement had been signed did not contravene *Savair, supra* (Pet. App. 9a-10a).

---

[3]In *Savair, supra*, this Court held that a union's offer to waive initiation fees *only* of employees who sign authorization cards prior to an election impermissibly interferes with the employees' right to refrain from union activities and their statutory right to a free and fair election (*id.* at 277).

BLEED TH

ARGUMENT

1. Contrary to the Company's contention, the decision below does not conflict with *National Labor Relations Board* v. *Savair Manufacturing Co., supra.* There, this Court noted that the union's legitimate interest in waiving initiation fees could be preserved without election interference if the waiver were made available to all employees who join "the union before an election [and] also to those who join after the election." 414 U.S. at 272-274, n. 4. Here, it is undisputed that the Union's offer to waive dues and fees until a collective bargaining agreement had been negotiated and ratified was made to all employees.

Unlike a pre-election offer limited to employees who support the union, an unconditional waiver to all employees does not "allow the union to buy endorsements and paint a false portrait of employee support during its election campaign" (414 U.S. at 277). Employees who vote against the union benefit from the initial waiver of fees and dues equally with those who vote for the union. And, unlike a pre-election offer by an employer, who is in a position to alter terms and conditions of employment in anticipation of an election and thereby directly interfere with his employees' free choice, the union's offer necessarily is contingent on events it does not control; if it loses the election or fails to negotiate and ratify a collective bargaining agreement, it will have no power to impose monetary obligations on any unit employee.[4]

---

[4]Accordingly, every court of appeals that has ruled on the question has held that a union's unconditional offer to waive fees and dues, not predicated on pre-election support, does not impermissibly interfere with an election and therefore is not prohibited by *Savair, supra.* See, *e.g., National Labor Relations Board* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (C.A. 8), certiorari denied, 423 U.S. 827; *Altman Camera Co., Inc.* v. *National Labor Relations*

POOR COPY

2. The Company also contends that the Board abused its discretion in limiting the bargaining unit to employees in the Company's district office. Section 9(b) of the Act authorizes the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[5] Under settled principles, a single district office in the insurance industry is presumptively an appropriate bargaining unit.[6] This presumption was not

---

Board, 511 F.2d 319, 322 (C.A. 7); *National Labor Relations Board* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-1313 (C.A. 6); *National Labor Relations Board* v. *Benner Glass Co.*, 514 F.2d 641, 642 (C.A. 5), certiorari denied, No. 75-654, January 12, 1976; *National Labor Relations Board* v. *Stone & Thomas*, 502 F.2d 957, 958 (C.A. 4); *National Labor Relations Board* v. *Dunkirk Motor Inn*, 524 F.2d 663, 665 (C.A. 2); *Thrift Drug* v. *National Labor Relations Board*, 521 F.2d 243 (C.A. 5), certiorari denied, No. 75-1063, April 5, 1976.

[5]In view of this broad authority, the finding that a particular unit is appropriate will not be set aside unless the Board has acted arbitrarily (*Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491-492), or has failed clearly to articulate the basis for its determination (*National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-443).

[6]See, *e.g.*, *Michigan Hospital Service Corp.* v. *National Labor Relations Board*, 472 F.2d 293 (C.A. 6); *Continental Insurance Co.* v. *National Labor Relations Board*, 409 F.2d 727 (C.A. 2), certiorari denied, 396 U.S. 902; *National Labor Relations Board* v. *American Life & Accident Insurance Co.*, 394 F.2d 616 (C.A. 6), certiorari denied, 393 U.S. 913; *National Labor Relations Board* v. *Western & Southern Life Insurance Company*, 391 F.2d 119 (C.A. 3), certiorari denied, 393 U.S. 978; *Metropolitan Life Insurance Co.*, 156 NLRB 1408; *Quaker City Life Insurance Co.*, 134 NLRB 960, 138 NLRB 61, enforced, 319 F.2d 690 (C.A. 4). The application of this presumption to units of clerical employees in district offices is also settled. See *Empire Mutual Insurance Co.*, 195 NLRB 284; *Equitable Life Assurance Society*, 192 NLRB 544; *Fireman's Fund Insurance Co.*, 173 NLRB 982.

BLEED THROU

rebutted in the instant case since the Board found that the Grosse Pointe district office "maintains the substantial degree of autonomy necessary for collective bargaining to effectively function" (Pet. App. 30a). As shown above (pp. 2-3), the record adequately supports this finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
ALAN BANOV,
Attorneys,
National Labor Relations Board.

MAY 1976.

DOJ-1976-05

POOR COPY